In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 351

MCKINLEY DURHAM AND LUCIOUS PATTERSON, SR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1969. The petition for a writ of certiorari was filed on July 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly denied petitioners' motion to dismiss for lack of speedy trial.

2. Whether the financial arrangement between the government and the informer resulted in entrapment so as to require reversal of petitioners' convictions.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of possessing and selling non-tax-paid liquor, in violation of 26 U.S.C. 5205(a) and 5604 (a). On November 1, 1968, Durham was sentenced to imprisonment for six concurrent terms of one year and a day; Patterson, for two concurrent terms of eighteen months. On appeal, the court of appeals affirmed *per curiam*.

The evidence showed that in October 1966, Alcohol and Tobacco Tax Division agent Robert Griffith enlisted Joe B. Hayes to serve as an informer on federal liquor law violators in the area of Macon, Georgia (R. 48, 58).[1] Griffith agreed to pay Hayes $10 per day for expenses, and a bonus at the end of his employment if his efforts were successful overall (R. 24, 63). The informer was specifically directed not to entice individuals into selling him liquor or to offer to pay more than the going rate (R. 49). Griffith urged Hayes to attempt to make a purchase from

[1] "R." refers to the "Transcript of Record" on file with the Clerk of this Court.

petitioner Patterson, an acquaintance of Hayes. The agent had reason to believe that Patterson was "the biggest bootlegger down there" (R. 72).

On November 29, 1966, Hayes met Patterson at the latter's gasoline station and offered to purchase forty gallons of whiskey. Patterson agreed to make the sale and told Hayes that the transaction would take place at an old saw mill (R. 17-18). Prior to the designated time for the purchase, agent Griffith removed the back-up light lens from Hayes' car in order to enable him to observe the transaction while hiding in the trunk (R. 49). That evening Hayes, with Griffith secreted in the trunk, drove Patterson to the saw mill. There they met co-petitioner Durham, who had driven a pick-up truck containing the illicit liquor (R. 18, 49-50). Hayes paid Patterson $200 in funds furnished by the agent, and received eight five-gallon jugs containing moonshine whiskey on which the prescribed taxes had not been paid (R. 18, 51-52). Patterson told Hayes to return the empty jugs (R. 23). Additional 20-gallon purchases were made on December 8 and 15, 1966, each time observed by an agent located in the trunk of the car driven by Hayes (R. 19-21, 52-54). At the end of his employment, which involved informing on more than twenty violators, Hayes received a bonus of $400 (R. 25, 74).

ARGUMENT

1. The courts below correctly held that petitioners were not entitled to a dismissal of their case for lack of a speedy trial. They were arrested on January 17,

1967 (R. 71), and indicted on July 25, 1967. Trial occurred on October 21, 1968. Most of the pre-trial delay was occasioned by the disappearance of the informer, Hayes, for a period of nine months. When located in Centre, Alabama, Hayes was immediately returned to the Middle District of Georgia. There was no question of any dilatory action by the government. See *Pollard* v. *United States*, 352 U.S. 354, 361. Nor did petitioners suffer any prejudice from the delay.[2] They were not incarcerated during this time, and they made no showing whatever that evidence had disappeared or witnesses had become unavailable. In light of these circumstances, petitioners' speedy trial claim is without merit. *United States* v. *Ewell*, 383 U.S. 116, 120-123; *Smith* v. *United States*, 360 U.S. 1, 10; *Beavers* v. *Haubert*, 198 U.S. 77, 87; see also *Harrison* v. *United States*, 392 U.S. 219, 221, n. 4; *Hedgepeth* v. *United States*, 365 F. 2d 952, 954 (C.A.D.C.).

2. The evidence failed to establish unlawful entrapment, in view of the clear showing that petitioners demonstrated no reluctance whatsoever to sell illicit liquor to the informer. Petitioners urge this Court to strike down their convictions because of the terms of the financial arrangement between the informer and the government agents. In support of their position they cite *Williamson* v. *United States*, 311 F. 2d 441 (C.A. 5), where the court of appeals

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[2] In their pretrial motion to dismiss the indictment, petitioners' only reference to prejudice was a claim that they had been kept from "various endeavors" for "no less than eight days." (R. 6).

reversed a conviction because payments of specific sums of money were promised to an informer if he would "catch" two particular suspects. The Fifth Circuit and other courts of appeals as well have distinguished *Williamson* and upheld convictions where the informant is paid, not a specific sum for the conviction of a specific individual, but a per diem amount and an unspecified bonus depending upon the success of his entire efforts (all of which is paid before any convictions). *Henley* v. *United States*, 406 F. 2d 705 (C.A. 5); *Harris* v. *United States*, 400 F. 2d 264 (C.A. 5); *Moore* v. *United States*, 399 F. 2d 318 (C.A. 5), certiorari denied, 393 U.S. 1098; *Bullock* v. *United States*, 383 F. 2d 545 (C.A. 5); *United States* v. *Costner*, 369 F. 2d 959, 973 (C.A. 6), *United States* v. *Baxter*, 342 F. 2d 773 (C.A. 6), certiorari denied, 381 U.S. 934; *Maestas* v. *United States*, 341 F. 2d 493 (C.A. 10); *United States* v. *Crim*, 340 F. 2d 989 (C.A. 4). There is thus no occasion for further review of this issue.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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